October 6, 2003

POLICY REPORT

RE: Commercial Water Taking and its Regulation in the Area of the Niagara Escarpment Plan - Interpretation as a Permitted Use

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Topic:

Various types of water taking occur throughout the area of the Niagara Escarpment Plan (NEP). The majority of these relate to the taking or use of water, which can be considered accessory, or incidental, to a permitted use listed in the Plan. For example, this includes water for rural residences and farms, home businesses, pumping related to mineral resource extraction, irrigation for golf courses, snow making for ski resorts, and municipal supplies servicing urban, minor urban and recreation areas.

The Plan also has a limited number of "existing" commercial wells used by the water bottling and beverage industry. These would be recognized as existing uses under the NEP. As well, numbers of local naturally occurring springs are also used informally by the public for drinking water.

In addition, the Plan allows utility facilities. These are defined as including (amongst other utilities) a water supply, or any other similar works or systems necessary to the public interest.

The Plan is, however, not explicit on whether privately operated commercial wells or water taking is a permitted use.

Issue:

The Niagara Escarpment Commission (NEC) has received an application for the use of wells on a property in the Town of Mono for commercial purposes (Genuine Springs Inc.). The water would be trucked off site and used for the purposes of bottling (public consumption), food manufacturing (bakeries, breweries, etc.) and local use (e.g., swimming pools, drinking water).

The question which first has to be answered is whether or not commercial water taking is a permitted use under the NEP. If the answer is yes, then the Development Permit Application could be processed. If the answer is no, then a Plan Amendment must be submitted for consideration.

The initial well drilling for water testing and subsequent application to the NEC is very controversial locally, and has resulted in legal action, petitions to the Province, council resolutions, letters to the NEC, etc.

The merits of the proposal are at this point secondary to the question about whether commercial water taking is a permitted use. The Plan already contains Development Criteria dealing specifically with water taking, related to its environmental sustainability, that must be addressed if the use is permitted. If not, and an Amendment to the NEP is required, then the underlying purpose and objectives of the *Niagara Escarpment Planning and Development Act* (NEPDA) and the NEP must be dealt with first. In the case of a Plan Amendment, the principle of commercial water taking would be at issue, not whether or not the technical policies and criteria of the Plan could be met.

Submissions on both sides of the issue have been received by the NEC; in part, as a consequence of the application in the Town of Mono, and also because of a municipally sponsored resolution calling for government action to prohibit or limit commercial water taking throughout the rural areas of southern Ontario. The petition to the Province received widespread municipal support.

Summary Recommendation:

Commercial water taking is not a permitted use under the NEP. Such an undertaking requires a Plan Amendment.

Related Background Information:

1. On April 17, 2003, a Regulation was filed under the *Ontario Water Resources Act* providing for a moratorium on most new applications to take water in the Niagara Escarpment Planning Area (NEPA) and the area of the Oak Ridges Moraine Plan (including water bottling). This was based on the recommendations in the Report produced by the Advisory Committee on Watershed-Based Source Protection Planning. The prohibition was to end on August 31, 2003, at which time it was envisaged that new rules would be available to protect water supplies in key source areas like the Niagara Escarpment. This prohibition has been extended to March 1, 2004. At the time of the writing of this report, specific new policy regarding the types of water taking dealt with by the prohibition, had not been released by the Ministry of the Environment (MOE). It is not known if specific policies would

be applied in the NEPA or whether policies would be common throughout Ontario.

2. In the area of the NEP, Development Permits are required for water taking, unless the taking is specifically exempted under Regulation 828/90. Exemptions include wells for a farm or residence, a farm irrigation system, and temporary test drilling for the supply of water. Commercial wells are not a class of development that is exempted. The issue of whether or not water taking was "development" was dealt with as part of the Acton Quarry judicial review that took place in 1995/96. The Courts found, amongst other matters, that water taking was regulated by the NEPDA since it was considered to be development. The Act requires a Development Permit from the NEC prior to any other approval or authorization that may be required under any other statute (e.g., a water taking permit).
3. At present, it is unclear whether commercial water taking is regulated under the *Planning Act* (PA). This matter is presently under appeal before the courts (i.e., in the matter of Artemesia Waters, Grey County). The initial court decision, which has been challenged, found that water taking was subject to the PA.
4. In terms of Development Permit history, since the NEP was approved in 1985, there have been no applications dealt with for new commercial wells/water taking. There are records of applications involving existing wells but these would have been "grandfathered" as existing uses (e.g., Crystal Springs at the Cataract, Dimpflemeir Bakery Springs in Caledon, Creemore Springs in Creemore). There may also have been approvals that the NEC is unaware of because the courts did not confirm the legal determination that water taking was considered development under the NEPDA, until 1996. This decision then became binding on other agencies that issue permits involving water taking, including MOE.
5. On several occasions since the approval of the Oak Ridges Moraine Plan (ORMP), the Coalition on the Niagara Escarpment (CONE) has asked that the NEC review its water taking policies with the goal of updating the NEP to incorporate the more environmentally rigorous provisions of the ORMP into the NEP. Staff had felt that this type of major amendment was premature until the changes proposed under the most recent Plan Review had been finalized. The NEC has also been waiting for the Province to produce/finalize its new water strategy.

Overview:

The Escarpment's important as a source area for ground and surface water cannot be underestimated. Indeed, the Escarpment constitutes a height of land across southern Ontario containing some of the most significant aquifers and recharge areas for natural streams and water supplies in the Province. The Escarpment is the headwater, or starting point, for many of these natural streams and water supplies.

For this very reason, the Escarpment and surrounding lands have increasingly become the focus of commercial investigation for "spring" water. The Escarpment is seen to be relatively undeveloped and pristine with what some would view as potentially vast reservoirs of an untapped high quality water supply that could be used for bottling and sale in close proximity to major urban markets. The Escarpment's reputation as an environmentally protected ecosystem and World Biosphere Reserve would lend brand recognition almost instantly to any water taken from the area.

Studies and ecological surveys and inventories for the area consistently emphasize the interrelationship of water with the natural environment and its linkages throughout the Escarpment lands and ecosystems. For example, aquifers that discharge water along the Escarpment face eventually find their way into creeks, streams and river systems, or feed marsh and wetland systems. A number of Provincially significant habitats and landforms owe their existence to one degree or another to water.

Many rural/agriculture communities and urban areas, both inside the NEP and adjacent to it, rely on these water sources as their only supply. They are dependent on the quantity and quality of the water; any loss or disruption would be irreplaceable and could be economically devastating. Some communities define themselves on their association with water (e.g., Headwaters Country).

The maintenance and protection of water supplies has become the focus of rigorous Provincial study and concern in recent years because of its significance as a critical Provincial resource. This concern is reflected by the current moratorium on the taking of water in the Escarpment and Oak Ridges planning areas.

The NEPDA's and the NEP's purpose and objectives specifically require the maintenance, protection and enhancement of natural water supplies.

Discussion:

As noted, the NEP does not list "commercial water taking" as a permitted use. The Plan does include utility as an allowed use.

Utility is defined as:

A water supply, storm or sanitary sewage, gas or oil pipeline, the generation, transmission and distribution of electric power, steam or hot water, towers, telegraph and telephone lines and other cabled services, a public transportation system, licensed broadcasting, receiving and transmitting facilities, or any other works or systems necessary to the public interest, but does not include:

- *The establishment of a new waste disposal site;*
- *Any expansion or alteration to an existing waste disposal site from what has been approved under the applicable legislation (including any expansion in area or height of the landfill or change in the type of the waste materials being disposed);*
- *Incineration facilities (including energy from waste facilities):*
- *Large scale packer and/or recycling plants or similar uses.*

The definition therefore encompasses a number of other uses under the umbrella term "utility".

The question is whether or not the term "a water supply" was intended, or can be reasonably interpreted, to include water taking undertaken for private commercial purposes.

In looking at the definition, one of the limitations that provides some direction is the statement, "or any other works or systems necessary to the public interest". In staff's view, this is a clear indication that the drafters of the definition were making a distinction between uses that could be considered utilities that were primarily private in nature and those that served the good of the broader general public.

Normally, a utility is provided by a municipal or government agency directly. A utility can also be provided by a private company and is licensed or regulated by a government agency since the utility is deemed an essential service. Although private, its absence would have a significant impact on the public. Examples would be telephone services or the distribution of natural gas.

There are private piped water systems that serve the general public and some municipalities have private companies operating their municipal water systems. These water systems, however, are run for the benefit of the community at large, and provide an essential public service, distributing piped water to ratepayers.

Although the public requires water, the public does not rely on bottled spring water for its domestic supply. Bottled water is a life style choice and except in emergencies, where a municipal supply has been disrupted, bottled water is not essential. In this respect, the taking of water for bottling is not a utility as defined by the NEP.

Significant water taking does occur in the area of the NEP. As noted in the introduction to this Policy Report, examples include mineral resource extraction, golf courses, snowmaking and municipal water services. The water quantity associated with these uses is substantially more than is produced from commercial wells. It could, therefore, be argued that the sale of a limited amount

of water for bottling (even if more operations were approved) would in all likelihood have minimal impact on supplies in comparison to other major users. Given this comparison, the position could be taken that it would seem illogical to treat commercial wells in a more prohibitory manner than other permitted uses.

A counter point that has been raised is that commercial wells remove water from the local watershed permanently. The pumping related to other uses, such as golf course irrigation or industrial gravel washing, returns supplies to the same watershed and, therefore, the water is eventually recycled back into the same aquifer. However, the significance of this would be dependent on the number of commercial wells in any given area and the amount of water taken.

At the time the NEP was written, the issue of commercial water taking and bottled water did not receive much attention. Staff recalls no submissions or NEC deliberations on the topic. It was never considered specifically as a stand-alone use and, therefore, was not reflected in the Plan approved in 1985. Two successive Plan Reviews have not altered the Plan's wording or intent in this respect.

One of the topics proposed by the NEC for the 1999 Plan Review was the examination of commercial water taking on the Escarpment with respect to the role of the Escarpment as a source for this activity and the adequacy of policies to address this type of use. The topic was eventually withdrawn because the government had indicated that the entire Provincial water strategy was under review and it would be premature for the NEC to deal with the issue until investigations and study had been complete. The NEC resolution was to defer the matter to a later date. The implication is therefore that the NEC did not consider that the Plan dealt with commercial water taking as a permitted use, nor did it contain policies to adequately deal with the use.

This, in staff's opinion, is also borne out by the Development Criteria in the Plan. None of the references refer to commercial water taking. Where references to permitted uses in the Development Criteria exist they generally talk about water taking as an activity associated with, or involving, another permitted use. The conclusion would be that commercial water taking was not a use contemplated under the current NEP.

A final caution is that a determination that commercial water taking is permitted would set the precedent on this emerging land use issue in the NEP. The NEC is already on record as having concerns about the adequacy of exiting NEP policies to address the use.

Conclusion:

Water is a significant and critical ecological component of the Escarpment and land in its vicinity. Water is highlighted in the NEPDA and NEP as a protected resource that is a key component of the Escarpment's continuous natural environment. Natural water supplies are to be maintained and enhanced.

The Plan, as currently drafted and approved, does not allow commercial water taking/bottling as a permitted use. Whether it should be allowed is, therefore, a matter that should be addressed fully through a comprehensive policy review. In the interim, applicants who wish to propose commercial water taking operations can wait for such a review to occur or propose a site-specific amendment to the NEP to accommodate the use on an exception basis.

The current Provincial moratorium on water taking in the area of the NEP prevents the NEC from processing Development Permits for water taking until after March 1, 2004, assuming the moratorium is not extended. After the moratorium, an applicant can still request that a Development Permit Application be dealt with even if the NEC finds that commercial water taking is not allowed under the NEP. This would provide the applicant with an appeal mechanism should the proponent disagree with the NEC determination.

Outside the NEP, regulatory and planning ministries/agencies are generally dealing with water in a more holistic manner. This involves the preparation of comprehensive water budgets determined on an aquifer or regional basis. This is the direction being followed in the area of the Oak Ridges Moraine where the policies require full ground water budgets as part of the implementation of the ORM Plan. These budgets are subject to review and approval by the Province. This direction may be adopted Province wide. As well, many conservation authorities (e.g., Credit Valley Conservation) have, for a number of years, been undertaking watershed and sub-watershed plans to quantify and define the function of water within their areas of jurisdiction. These plans call for ongoing monitoring to provide benchmarks and to ensure the health of the natural water systems.

Niagara Escarpment aquifers and watersheds straddle the boundary of the Plan since the area was delineated as a corridor coinciding with the physical landform of the Niagara Escarpment. In most instances, the defined area of the Plan does not include the entire natural system which also includes the watershed. Consequently, water taking outside the NEP could still have significant impacts inside. In this respect, the NEC must also look at water taking on a comprehensive basis. Any future policy review of commercial water taking and the other policies governing water in the NEP must consider watersheds straddling the Escarpment as a key environmental factor. It is anticipated that some direction on this issue will be provided on a Provincial level when the government's comprehensive water strategy is finalized.

Recommendation:

That the Niagara Escarpment Commission determines as follows:

1. That commercial water taking/bottling is not a permitted use under the Niagara Escarpment Plan.

2. That such an undertaking will require an Amendment to the Plan pursuant to Section 6.1 of the *Niagara Escarpment Planning and Development Act.*

3. That the issue of whether or not commercial water taking should be a permitted use in the Niagara Escarpment Plan should be dealt with fully through a comprehensive policy review, taking into consideration any future Provincial strategy on water taking.

4. That the current water taking moratorium in the Niagara Escarpment Planning Area be extended beyond March 1, 2004 if the Provincial strategy on water management has not been completed by that date.

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Manager

C/KW/ Commercial Water Taking Policy Paper-final Oct 6, 2003